

## Second Supplement to Memorandum 93-43

**Subject: L-3044— Comprehensive Power of Attorney Statute (Revised Provisions Concerning Attorney-in-Fact's Affidavit and Reliance by Third Persons)**

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This supplement presents a staff draft of a revised section concerning reliance by third persons on an affidavit (or certificate) of the attorney-in-fact. This redraft is based on the version of Probate Code Section 18100.5 that has been passed by the Legislature and sent to the Governor. See AB 1249 (Horcher). We anticipate that the bill will be signed, inasmuch as there were only four negative votes in the Legislature. The text of Probate Code Section 18100.5, as revised in AB 1249, is set out as an exhibit to this supplement for reference purposes.

The alternate sections below would replace Sections 4305 and 4306 in the draft attached to Memorandum 93-43.

**§ 4305 [alternate]. Attorney-in-fact's affidavit**

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4305. (a) The attorney-in-fact may present an affidavit to any person in lieu of providing a copy of the power of attorney to establish the existence or terms of the power of attorney. An affidavit may be executed by the attorney-in-fact voluntarily or at the request of the person with whom the attorney-in-fact is dealing.

(b) The affidavit may confirm the following facts or contain the following information:

- (1) The existence of the power of attorney and date of its execution.
- (2) The identity of the principal and the currently acting attorney-in-fact.
- (3) The authority of the attorney-in-fact.
- (4) The identity of any persons granted authority under the power of attorney to determine whether the principal lacks capacity or that the power of attorney is in effect.

(5) Where there are multiple attorneys-in-fact, the signature authority of the attorneys-in-fact, indicating whether all or less than all of the currently acting attorneys-in-fact are required to sign in order to exercise their authority.

(c) The certification shall contain the following statements:

- (1) That the power of attorney has not been revoked or modified in any manner that would cause the representations contained in the affidavit to be incorrect.
- (2) That the affidavit is being signed by all of the currently acting attorneys-in-fact.

(d) The affidavit shall be in the form of an acknowledged declaration signed by all attorneys-in-fact currently acting under the power of attorney .

(e) The affidavit may not be required to contain other provisions of the power of attorney unrelated to the pending transaction.

(f) A person may require that the attorney-in-fact offering the affidavit provide copies of those excerpts from the original power of attorney and any modifications that designate the attorney-in-fact and grant authority to the attorney-in-fact to act in the pending transaction.

**Comment.** Section 4305 supersedes former Civil Code Section 2404. This section is drawn from Section 18100.5(a)-(e) [as enacted by AB 1249 (1993)].

**§ 4306 [alternate]. Reliance on attorney-in-fact's affidavit**

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4306. (a) A person who acts in reliance on an affidavit furnished pursuant to Section 4305 without actual knowledge that the representations contained in it are incorrect is not liable to any person for so acting.

(b) A person who does not have actual knowledge that the facts contained in the affidavit are incorrect may assume without inquiry the existence of the facts contained in the affidavit. Actual knowledge may not be inferred solely from the fact that a copy of all or part of the power of attorney is held by the person relying on the affidavit. Any transaction, and any lien created thereby, entered into by the attorney-in-fact and a person acting in reliance on the affidavit is enforceable against the principal's property involved. However, if the person has actual knowledge that the attorney-in-fact is acting outside the scope the authority granted, the transaction is not enforceable against the principal's property.

(c) A person's failure to demand an affidavit does not affect the protection provided by this chapter, and no inference as to whether that person has acted in good faith may be drawn from the failure to demand an affidavit.

(d) Except in the context of litigation and subject to subdivision (f) of Section 4305, a person making a demand for the power of attorney in addition to an affidavit to prove facts set forth in the affidavit acceptable to the third party is liable for damages, including attorney's fees, incurred as a result of the refusal to accept the affidavit in lieu of the requested documents if the court determines that the person acted in bad faith in requesting the documents.

(e) Nothing in this section is intended to create an implication that a person is liable for acting in reliance on an affidavit under circumstances where the requirements of this section or Section 4305 are not satisfied.

(f) Nothing in this section limits the rights of the principal or the principal's successors against the attorney-in-fact.

**Comment.** Section 4306 is drawn from the rule applicable to third persons dealing with trustees. See Section 18100.5(f)-(h) [AB 1249 (1993)].

Respectfully submitted,

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Assistant Executive Secretary

**EXHIBIT 1**

**Probate Code Section 18100.5  
as revised by AB 1249 (enrolled bill)**

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18100.5. (a) The trustee may present a certification of trust to any person in lieu of providing a copy of the trust instrument to establish the existence or terms of the trust. A certification of trust may be executed by the trustee voluntarily or at the request of the person with whom the trustee is dealing.

(b) The certification of trust may confirm the following facts or contain the following information:

- (1) The existence of the trust and date of execution of the trust instrument.
- (2) The identity of the settlor or settlors and the currently acting trustee or trustees of the trust.
- (3) The powers of the trustee.
- (4) The revocability or irrevocability of the trust and the identity of any person holding any power to revoke the trust.
- (5) When there are multiple trustees, the signature authority of the trustees, indicating whether all or less than all of the currently acting trustees are required to sign in order to exercise various powers of the trustee.
- (6) The trust identification number, whether a social security number or an employer identification number.
- (7) The manner in which title to trust assets should be taken.

(c) The certification shall contain a statement that the trust has not been revoked, modified, or amended in any manner which would cause the representations contained in the certification of trust to be incorrect and shall contain a statement that it is being signed by all of the currently acting trustees of the trust. The certification shall be in the form of an acknowledged declaration signed by all currently acting trustees of the trust.

(d) The certification of trust shall not be required to contain the dispositive provisions of the trust which set forth the distribution of the trust estate.

(e) A person may require that the trustee offering the certification of trust provide copies of those excerpts from the original trust documents and amendments thereto which designate the trustee and confer upon the trustee the power to act in the pending transaction. Nothing in this section is intended to require or imply an obligation to provide the dispositive provisions of the trust or the entire trust and amendments thereto.

(f) A person who acts in reliance upon a certification of trust without actual knowledge that the representations contained therein are incorrect is not liable to

any person for so acting. A person who does not have actual knowledge that the facts contained in the certification of trust are incorrect may assume without inquiry the existence of the facts contained in the certification of trust. Actual knowledge shall not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the trust certification. Any transaction, and any lien created thereby, entered into by the trustee and a person acting in reliance upon a certification of trust shall be enforceable against the trust assets. However, if the person has actual knowledge that the trustee is acting outside the scope of the trust, then the transaction is not enforceable against the trust assets. Nothing contained herein shall limit the rights of the beneficiaries of the trust against the trustee.

(g) A person's failure to demand a certification of trust does not affect the protection provided that person by Section 18100, and no inference as to whether that person has acted in good faith may be drawn from the failure to demand a certification of trust. Nothing in this section is intended to create an implication that a person is liable for acting in reliance upon a certification of trust under circumstances where the requirements of this section are not satisfied.

(h) Except when requested by a beneficiary or in the context of litigation concerning a trust and subject to the provisions of subdivision (e), any person making a demand for the trust documents in addition to a certification of trust to prove facts set forth in the certification of trust acceptable to the third party shall be liable for damages, including attorney's fees, incurred as a result of the refusal to accept the certification of trust in lieu of the requested documents if the court determines that the person acted in bad faith in requesting the trust documents.